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4 **IN THE UNITED STATES DISTRICT COURT**
5 **FOR THE DISTRICT OF ARIZONA**
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7 United States of America,

8 Plaintiff,

9 v.

10 Marcell Demetrius Gray,

11 Defendant.
12

CR-18-01695-002-TUC-JAS (EJM)

REPORT AND RECOMMENDATION

13
14 Pending before the Court is defendant Marcell Demetrius Gray's Motion to Dismiss
15 Indictment for Outrageous Government Conduct. (Doc. 1123.) The defendant sets forth
16 two reasons why the indictment should be dismissed: (1) the selective enforcement of the
17 law against the defendant by encouraging, aiding, abetting, and inciting a confidential
18 informant ("CI") to entrap Willie B. Smith into killing the defendant; and (2) the lead
19 detective on the E.M. homicide tainted the investigation beyond rehabilitation such that
20 any attempt to allow this prosecution to proceed against the defendant would be a due
21 process violation. The defendant requests an evidentiary hearing to develop the record to
22 support both arguments. For the reasons discussed below, the Court denies the request for
23 an evidentiary hearing because the defendant has not made a *prima facie* case of outrageous
24 government conduct and recommends that the District Court deny the instant motion.

25 **FACTUAL BACKGROUND**
26

27 On April 6, 2022, a federal grand jury sitting in Tucson, Arizona, returned a Third
28 Superseding Indictment against Marcell Demetrius Gray and eighteen other individuals.

1 (Doc. 1425.) The charged offenses pertain to an alleged criminal enterprise operated by a
2 gang known as the Western Hills Bloods (“WHB”). The alleged criminal enterprise
3 involved acts of violence and drug trafficking.

4 Gray is charged with the following offenses: (1) Count One charges Gray (and other
5 co-defendants) with participating in a RICO conspiracy, in violation of 18 U.S.C. §§
6 1962(d) and 1963(a), the objects of which are: (a) acts involving murder (18 U.S.C. §§
7 1959(b)(1) and 1961(1)); (b) offenses involving drug trafficking (21 U.S.C. §§ 846 and
8 841); and (c) acts involving the obstruction of justice (18 U.S.C. § 1512); (2) Count Two
9 charges Gray (and other co-defendants) with Violent Crime in Aid of Racketeering –
10 Conspiracy to Commit Murder, in violation of 18 U.S.C. § 1959(a)(5); (3) Counts Three
11 and Eight charge Gray (and other co-defendants) with Violent Crime in Aid of
12 Racketeering – Murder, in violation of 18 U.S.C. §§ 1959(a)(1) and 2; (4) Count Four
13 charges Gray (and other co-defendants) with Use of a Firearm During and in Relation to a
14 Crime of Violence Resulting in Death, in violation of 18 U.S.C. §§ 924(j), 924(c)(1)(A)(i),
15 (ii), (iii), and 2; (5) Count Seven charges Gray (and other co-defendants) with Accessory
16 After the Fact, in violation of 18 U.S.C. §§ 2 and 3; (6) Count Nine charges Gray (and a
17 co-defendant) with Use of a Firearm During and in Relation to a Crime of Violence
18 Resulting in Death, in violation of 18 U.S.C. §§ 924(j), 924(c)(1)(A)(i), (ii), (iii), and 2;
19 (7) Count Ten charges Gray with Possession of a Firearm and Ammunition by a Prohibited
20 Person, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (8) Count Eleven charges
21 Gray (and a co-defendant) with Possession and Use of a Firearm in Furtherance of a Drug
22 Trafficking Crime, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2; (9) Count Twenty-
23 four charges Gray (and other co-defendants) with Conspiracy to Possess with Intent to
24 Distribute Cocaine, in violation of 21 U.S.C. §§ 846 and 841; (10) Count Twenty-five
25 charges Gray (and other co-defendants) with Possession with Intent to Distribute Cocaine,
26 in violation of 21 U.S.C. § 841; (11) Count Thirty charges Gray (and a co-defendant) with
27 Possession with Intent to Distribute Heroin, in violation of 21 U.S.C. § 841; and (12) Count
28 Thirty-one charges Gray (and a co-defendant) with Possession with Intent to Distribute

1 Cocaine, in violation of 21 U.S.C. § 841.

2 On February 18, 2022, the defendant filed a Motion to Dismiss Indictment for
 3 Outrageous Government Conduct. (Doc. 1123.) As noted above, the first allegation of
 4 outrageous government conduct is the encouraging, aiding, abetting, and inciting a
 5 confidential informant (“CI”) to entrap Willie B. Smith into killing the defendant.¹ The
 6 defendant argues that “[p]rior to a complete, unbiased investigation into the murder of
 7 E.M., officers from the Arizona Department of Public Safety (DPS), **concluded** that
 8 Marcell D. Gray killed E.M., Willie B. Smith’s brother, **and** conveyed this information
 9 unequivocally, at the very minimum, to the confidential informant (CI) Slim.” [Bold in
 10 original.] *Id.* at 15-16. The defendant points out that Slim was receiving thousands of
 11 dollars in payment from the government for serving as a CI on an investigation called
 12 Operation Graceland. *Id.* at 16. The defendant alleges that during a recorded meeting
 13 between Smith and Slim in a vehicle, DPS got Smith’s agreement to kill the defendant at
 14 the time, place, and manner suggested by Slim. *Id.* at 17. Officers allowed Smith to leave
 15 the meeting “distraught, high, and armed” and “waited **24 hours** for Smith to kill Mr. Gray
 16 before arresting Smith pursuant to a warrant[.]” [Bold in original.] *Id.* At oral argument,
 17 defense counsel pointed out that neither Smith nor Gray were under surveillance by law
 18 enforcement during the 24 hours between the meeting and Smith’s arrest. This indifference
 19 to Gray’s safety during that time period is the heart of the outrageous government conduct.

20 The second allegation of outrageous government conduct is that the lead detective
 21 on the E.M. homicide tainted the investigation beyond rehabilitation such that any attempt
 22 to allow this prosecution to proceed against the defendant would be a due process violation.
 23 The defense makes the sweeping allegation that Detective Barber, who is deceased, had a
 24 “personal vengeance to have Mr. Gray killed or locked away for life.” *Id.* at 18. The
 25 defense then points to a litany of Detective Barber’s errors or failures, many of which
 26 apparently surfaced during an Internal Affairs investigation, that demonstrate his
 27 vengeance. Specifically, Detective Barber: (1) did not preserve a 911 call related to the

28 ¹ It is not clear how the alleged entrapment of Willie Smith is relevant to the defendant’s charges, and the defendant has not explained the relevance.

1 murder; (2) failed to contact or identify C.M., a witness who called the deceased's sister
 2 and told her about the victim before anyone else; (3) failed to follow-up and clarify
 3 conflicting information of P.F., an eyewitness to the murder; (4) failed to do a summary of
 4 the interview of J.E. and did not place the audio of the interview in evidence; (5) failed to
 5 document or review the bus video of the homicide victim; (6) failed to provide
 6 documentation for the subjects in the lead sheet section of the case or the 88-Crime tip
 7 suspects; (7) failed to document suspect S.S.'s interview; (8) failed to document a
 8 supplement from an interview conducted with the deceased's sister; (9) failed to follow up
 9 on "NIBIN," when six cases were connected to the homicide; (10) failed to follow up from
 10 an 88-Crime tip of suspect A.S., who another detective identified as being involved in a
 11 murder at the hookah lounge; and (11) failed to follow up on suspect R.S. who E.M.'s
 12 family members said killed E.M.

13 DISCUSSION

14
 15 A court may dismiss a criminal indictment when government conduct is so
 16 outrageous that it violates due process. *United States v. Wiley*, 794 F.2d 514, 515 (9th Cir.
 17 1986). Outrageous government conduct occurs when the actions of law enforcement
 18 officer or informants are "'so outrageous that due process principles would absolutely bar
 19 the government from invoking judicial processes to obtain a conviction.'" *United States*
 20 *v. Black*, 733 F.3d 294, 302 (9th Cir. 2013) (quoting *United States v. Russell*, 411 U.S. 423,
 21 431-432 (1973)). Dismissing an indictment for outrageous government conduct is
 22 "'limited to extreme cases' in which the defendant can demonstrate that the government's
 23 conduct 'violates fundamental fairness and is so grossly shocking and so outrageous as to
 24 violate the universal sense of justice.'" *Black*, 733 F.3d at 302 (quoting *United States v.*
 25 *Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011)). "This is an 'extremely high standard.'" *Id.*
 26 (quoting *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993)).

27 Because the conduct must shock the conscience of the court, "outrageous
 28 government conduct is not to be equated with negligence or poor judgment." *United States*

1 v. Wiley, 794 F.2d at 515. “The Government’s involvement must be *malum in se* or amount
 2 to the engineering and direction of the criminal enterprise from start to finish.” *United*
 3 *States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991). Moreover, “in order to secure dismissal
 4 of an indictment due to outrageous government conduct, a defendant must show a nexus
 5 between the conduct and either ‘securing the indictment or [] procuring the conviction.’”
 6 *United States v. Dominguez-Caicedo*, 40 F.4th 938, 949 (9th Cir. 2022) (quoting *United*
 7 *States v. Nickerson*, 731 F.3d 1009, 1015 (9th Cir. 2013)).

8 “There is no bright line dictating when law enforcement conduct crosses the line
 9 between acceptable and outrageous, so ‘every case must be resolved on its own particular
 10 facts.’” *Black*, 733 F.3d at 302 (internal quotation and citation omitted). However,
 11 “[p]revious outrageous government conduct cases, viewed collectively, have identified
 12 various factors as relevant to whether the government’s conduct was outrageous: (1) known
 13 criminal characteristics of the defendants; (2) individualized suspicion of the defendants;
 14 (3) the government’s role in creating the crime of conviction; (4) the government’s
 15 encouragement of the defendants to commit the offense conduct; (5) the nature of the
 16 government’s participation in the offense conduct; and (6) the nature of the crime being
 17 pursued and necessity for the actions taken in light of the nature of the criminal enterprise
 18 at issue.” *Black*, 733 F.3d at 303.

19 The Court first notes that many of the factors that the Ninth Circuit has identified as
 20 relevant to whether the government’s conduct was outrageous do not apply to the case at
 21 hand because they involve the government’s initiation or participation in the charged
 22 offenses. Here, the government had no role in creating the charged crimes, did not
 23 encourage the defendant to commit the charged offenses, and did not participate in the
 24 offense conduct. Law enforcement was investigating historical crimes believed to have
 25 been committed by the defendant and his co-defendants. Thus, the factors discussed above
 26 do not support an argument that the government’s conduct was outrageous.

27 The Ninth Circuit has concluded that the following law enforcement tactics were
 28 not outrageous: (1) use of false identities by undercover agents; (2) the supply of

1 contraband at issue in the offense; (3) the commission of equally serious offenses by an
 2 undercover agent as part of the investigation; (4) the introduction of drugs into a prison to
 3 identify a distribution network; (5) the assistance and encouragement of escape attempts;
 4 (6) the use of a heroin-using prostitute informant whose own activities were under
 5 investigation and who engaged in regular intercourse with the defendant; (7) encouraging
 6 18-year-old patients in drug treatment centers to deal drugs; (8) videotaping a defendant
 7 while she was using a toilet in a holding cell at the police station; (9) the use of a reverse
 8 sting operation. *See Smith*, 924 F.2d at 889; *Nickerson*, 731 F.3d at 1014; *Black*, 733 F.3d
 9 at 310. In fact, the Ninth Circuit has “dismissed an indictment due to outrageous
 10 government conduct in a published opinion only once[.]” *Dominguez-Caicedo*, 40 F.4th at
 11 949 (citing *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971)).

12 In *Greene*, the government initiated contact with the defendant for the purpose of
 13 running an illegal bootlegging operation, supplied the equipment and raw materials for that
 14 operation, and was the defendant’s sole customer for two-and-a-half years. 454 F.2d at
 15 786-787. The Ninth Circuit held that the government could not “involve itself so directly
 16 and continuously over such a long period of time in the creation and maintenance of
 17 criminal operations, and yet prosecute its collaborators.” *Id.* at 787.²

18 The type of nexus in *Greene* between the allegedly outrageous conduct and securing
 19 the indictment is not present in the case at hand. There is certainly no nexus between the
 20 government’s failure to conduct immediate surveillance of Willie Smith or the defendant
 21 and securing the indictment. In fact, there is no charged offense that is remotely related to
 22 the Willie Smith incident; it is completely irrelevant to the charged offenses. Moreover,
 23 the Court notes that even if there was a nexus, the government’s conduct in not surveilling
 24 Smith or Gray during this 24-hour period was, at most, negligent or showed poor judgment,
 25 and was not *malum in se*.

26 ² The Court notes that the result in *Greene* was called into question by the Ninth Circuit in
 27 *Wiley*. In that case, the court pointed out that *Greene* “was decided prior to the Supreme
 28 Court’s decision in *Russell*, which held that entrapment is not of constitutional dimension,
 leaving only the most shocking and extreme conduct, of undefined specificity, open to
 constitutional inquiry.” *Wiley*, 794 F.2d at 517.

1 being served with a copy of this Report and Recommendation. No reply shall be filed
2 unless leave is granted from the District Court. If objections are filed, the parties should
3 use the following case number: **CR-18-01695-TUC-JAS**.

4 Failure to file timely objections to any factual or legal determination of the
5 Magistrate Judge in accordance with Fed. R. Crim. P. 59 may result in waiver of the right
6 of review.

7 Dated this 17th day of July, 2023.

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10 Eric J. Markovich
11 United States Magistrate Judge
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